

# An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur

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“Where we disagree [with the international commission of inquiry] is that this is a genocide and it has been going on for two years now. We’re just dismayed that this commission could not discover the government’s intent. It’s clear . . . .”<sup>1</sup>

“The reality is that people are being targeted simply on the basis of ethnicity, not on the basis of religion in this case but on the basis of a sense of African-ness and blackness—even if the perpetrators are sometimes blacker than those they are targeting.”<sup>2</sup>

## I. Introduction

The convoluted and contrived Report of the International Commission of Inquiry on Darfur (ICID) has facilitated the criminal ambivalence of the United Nations (UN) Security Council (UNSC) and other international actors in suppressing the ongoing genocide in Darfur, Western Sudan. The ICID’s legal reasoning merely hides the political motive underpinning its Report and reflects the mindset of an international community that, hitherto, has been reluctant to characterize genocide in situations similar to Darfur, to avoid triggering obligations entailed under the Genocide Convention<sup>3</sup>—the obligation to prevent,

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1. Newshour with Jim Lehrer: Darfur Report (PBS television broadcast Feb. 2, 2005), [http://www.pbs.org/newshour/bb/africa/jan-june05/sudan\\_2-02.html](http://www.pbs.org/newshour/bb/africa/jan-june05/sudan_2-02.html) (recounting statement by Salih Booker, Executive Director of Africa Action).

2. Samantha Power, Analysis: *Fulfilling A Responsibility to Protect: What Will it Take to End the ‘Age of Genocide’* (United States Holocaust Memorial Museum, May 4, 2004), <http://www.ushmm.org/conscience/analysis/details.php?content=2004-05-04&page=1&menupage=History&Concept> [hereinafter Power, Analysis].

3. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

suppress, and punish genocide.<sup>4</sup> Often, states do not have the will to apply their political and military power to prevent and suppress genocide<sup>5</sup> and this clearly is the case in Darfur, where powerful states and institutions that could have stepped in to make a difference have become accessories to acts of genocide.

On September 18, 2004, the UNSC, acting under chapter VII of the UN Charter,<sup>6</sup> adopted Resolution 1566<sup>7</sup> requesting the UN Secretary-General to establish an international commission of inquiry

in order immediately to investigate reports of violations of international humanitarian law [IHL] and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.<sup>8</sup>

The ICID consisted of five persons—Antonio Cassese, Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza, and Therese Striggner-Scott—with Cassese, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), as its Chairperson. It began its work on October 24, 2004, holding

extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, [non-governmental organizations] and United Nations representatives.<sup>9</sup>

On January 25, 2004—exactly three months after its inauguration, the ICID submitted its Report to the Secretary-General. The Report addressed four main issues: violations of IHL and human rights by all parties to the Darfur crisis; whether or not acts of genocide have taken place in Darfur; the identification of perpetrators; and accountability mechanisms.<sup>10</sup> Based on these templates, the ICID concluded that crimes against humanity and war crimes have been committed in Darfur justifying prosecution by the International Criminal Court (ICC). This conclusion was hardly surprising, given the high level of atrocities that defined Darfur since early 2003, including murder, torture, forced disappearances, rape and other sexual violence, forced displacement, insane destruction of properties, and pillages.<sup>11</sup> The ICID called on the UNSC to refer the Darfur situation

4. See *id.* arts. 1, 8 (“The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish . . . Any Contracting Party may call upon the competent organs of the [UN] to take such action under the Charter of the [UN] as they consider appropriate for the prevention and suppression of acts of genocide . . .”); see generally Payan Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

5. See, e.g., Louis Rene Beres, *Genocide, Law and Power Politics*, 10 WHITTIER L. REV. 329 (1988).

6. See, e.g., U.N. Charter art. 39 (empowering the UNSC to determine the existence of any threat to the peace or breach of the peace and to make recommendations or decide on measures necessary to maintain or restore international peace and security).

7. S.C. Res. 1564, U.N. Doc/S/Res/1564 (Sept. 18, 2004).

8. *Id.* ¶ 12.

9. INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL 2 (Jan. 25, 2005), available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) [hereinafter ICID Report].

10. See *id.* ¶¶ 2-10.

11. See generally AMNESTY INT’L USA, SUDAN: CONTINUING HUMAN RIGHTS VIOLATIONS, AI Index: AFR 54/038/2005, Apr. 13, 2005, available at <http://www.amnesty.org>; *Darfur in Flames: Atrocities in Western Sudan*, 16

to the ICC,<sup>12</sup> which the UNSC did in March 2005 when it adopted another chapter VII resolution mandating the ICC Prosecutor to investigate the Darfur situation and prosecute those that have committed grave crimes therein.<sup>13</sup> The ICID, however, was ambivalent on the question of genocide: though it found the existence of some objective elements of genocide, it concluded that there was no genocidal intent by the Government of Sudan (GoS).

This Article examines the ICID Report, in particular its conclusion on the question of genocide, and insists that the atrocities in Darfur are not only war crimes and crimes against humanity but also that the Khartoum-Janjaweed criminal alliance has resulted in genocide—"the crime of crimes"<sup>14</sup>—against black Africans, mostly the Fur, Masalit, and Zaghawa tribes, in Darfur. The harvest of atrocities in Darfur "has developed serious racial and ethnic overtones and clearly risks shattering historic if fragile patterns of co-existence."<sup>15</sup> Until the current conflict, the term African had little relevance in Darfur; but many of the Fur, Zaghawa and other victims of the GoS-militia attacks now increasingly identify themselves as African in contradistinction to their Arab attackers.<sup>16</sup>

It may well be that the gap between crimes against humanity and genocide has narrowed in recent years and that it is easier, from a prosecutor's standpoint, to prove the former than the latter;<sup>17</sup> but if, as William Schabas emphasizes, "the result is to insist upon the supreme heinousness of 'racial hatred', for want of a better term, and to reiterate society's condemnation of . . . mass killings . . . , [then] the distinction retains and deserves all of its significance."<sup>18</sup> The infinite preciousness of life requires more than a muted reaffirmation. A genocide characterization of the Darfur atrocities probably would have compelled the international community to suppress the ongoing genocide through humanitarian military intervention,<sup>19</sup> and to hold its perpetrators accountable. It is immaterial, for the present

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HUM. RTS. WATCH 1 (Apr. 2004), available at <http://www.hrw.org/reports/2004/sudan0404/sudan0404.pdf> [hereinafter *Darfur in Flames*]; *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, 16 HUM. RTS. WATCH 1 (May 2004), available at <http://www.hrw.org/reports/2004/sudan0504/sudan0504full.pdf>.

12. ICID Report, *supra* note 9, ¶ 647 (noting that the Darfur crimes meet all the thresholds of the Rome Statute of the International Criminal Court, adopted July 17, 1998, entry into force July 1, 2002, U.N. Doc. A/Conf.183/9 (1998), reprinted in 37 I.L.M. 999 (1998), corrected through May 8, 2000, by UN Doc. CN.177.2000.TREATIES-5 [hereinafter ICC Statute or Rome Statute]).

13. See S.C. Res. 1593, U.N. Doc/S/Res/1593 (Mar. 31, 2005).

14. See Prosecutor v. Kambanda, Case No. ICTR 97-23-S, judgment & sentence, ¶ 16 (Sept. 4, 1998); Prosecutor v. Serashugo, Case No. ICTR-98-39-S, sentence, ¶ 15 (Feb. 2, 1999).

15. *Darfur in Flames*, *supra* note 11, at 7-8; see also Linnea D. Manashaw, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT'L L.J. 303, 306 n.17 (2005) (stressing that the Africanization of Darfur is a "troubling sign of the increasing polarizing effect of the conflict").

16. See GÉRARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE 4-8* (2005); ALEX DE WAAL, *FAMINE THAT KILLS: DARFUR, SUDAN* xiv (2005); Matthew Happold, *Darfur, the Security Council, and the International Criminal Court* 55 INT'L & COMP. L.Q. 226, 226 (2006) ("The population of Darfur is Muslim but recent political developments have stressed ethnic divisions between 'Arabs' and 'Africans'"); *Darfur in Flames*, *supra* note 11, at 7-8 (noting that Darfurians "increasingly see the attacks on their communities by the Sudanese government as racially and ethnically motivated ones").

17. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 12 (2000) (arguing that the practical consequences of the distinction are now less important).

18. *Id.*

19. On the question of humanitarian military intervention (HMI) in the context of Darfur, see Nsongurua

argument, that the UNSC has already made a referral of the Darfur crimes to the ICC,<sup>20</sup> particularly as Resolution 1593 deliberately avoided the term genocide.

Since war crimes and crimes against humanity are taken as given in Sudan, this Article will focus on the problem of genocide. It begins by introducing genocide as an international crime, proceeds to examine the findings and conclusion of the ICID on the question of genocide in Darfur, and argues that its conclusion goes against the weight of evidence in Darfur and the existing jurisprudence on genocide, leaving unanswered many relevant questions from the point of view of international law.

## II. Genocide and International Law

Though the word genocide is of comparatively recent origin, the reality of genocide dates beyond the twentieth century. This Part briefly looks at scenarios of genocide and examines its prohibition and punishment in international law.

### A. SCENARIOS OF GENOCIDE

Genocide is both ancient and modern; as Leo Kuper writes, “[t]he word is new, the crime ancient.”<sup>21</sup> The Holocaust was probably “the most infamous and abominable [modern] example of genocide,”<sup>22</sup> epitomizing man’s proclivity towards infinite evil; but modern history has been one of recurring genocide:

the extermination of Tasmanian and other Australian aboriginals in the nineteenth century, the forced removal and elimination of American Indians in the United States over the past two hundred years, the German Vernichtungsbefehl, or extermination order, and subsequent virtual annihilation of the Herero in Namibia in 1904, the Turkish extermination of the Anatolian Americans in 1915 and contemporary massacres of Indians in the Americas, Tutsi in Rwanda, [and] Muslims in Bosnia and Herzegovina.<sup>23</sup>

During the Holocaust, Adolf Hitler literally translated Dante’s Divine Comedy—with its tortured portrait of hell—into reality. As Monty Penkower reflected, “[o]nce the Third

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J. Udombana, *When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149 (2005) (arguing that the grave and continuing crimes committed in Darfur justify HMI, given the failure of diplomacy to prize the GoS into halting the mayhem, and denouncing the apparent neutral posturing by the international community, stressing that such neutrality helps the killers and not the victims); Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005) (urging HMI in Sudan notwithstanding the absence of categorization of genocide by the ICID).

20. For commentaries on the UNSC referral, see Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT’L L. 1 (2005); Happold, *supra* note 16; Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 INT’L CRIM. JUST. 590 (2005).

21. LEO KUPER, GENOCIDE: ITS POLITICAL USAGE IN THE TWENTIETH CENTURY 11 (1981) [hereinafter KUPER, GENOCIDE] (recalling ancient examples of “horrifying genocidal massacres, such as the terror of Assyrian warfare in the eighth and seventh centuries B.C., when many cities were razed to the ground and whole populations carried off or brutally exterminated . . .”); cf. Jean-Paul Satre, *On Genocide*, in CRIMES OF WAR 534, 534 (Richard A. Falk et al. eds., 1971) (“The fact of genocide is as old as humanity.”).

22. JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND RWANDA 99 (2d ed. 2000). On the origins of twentieth century genocide, see, e.g., SVEN LINDQUIST, EXTERMINATE ALL THE BRUTES (1996) (exposing also the depths of European imperialism and racism in Africa). The phrase “exterminate all the brutes” is from a London Times editorial of 1873.

23. JONES, *supra* note 22, at 99.

Reich posited the quintessence of its Weltanschauung on a unique, murderous hatred of all 'non-Aryans'—read Jews—the Nazi progression into the inhuman knew no limits.<sup>24</sup> In the last days of the Final Solution to the Jewish Question, victims were reportedly marched to nearby forests, gravel pits and Jewish cemeteries where

executions were carried out with savagery and sadism, a crying child often being seized from its mother's arms and shot in front of her, or having its head crushed by a single blow from a rifle butt. Hundreds of children were thrown alive into pits, and died in fear and agony under the weight of bodies thrown on top of them.<sup>25</sup>

There have been other genocides in contemporary times, such as the killings of Bahais<sup>26</sup> and, despite ICID's Report, the "ongoing genocide" in Darfur.<sup>27</sup> The Rwanda genocide, however, remains "the purest genocide since 1945, and perhaps the single greatest act of evil since Pol Pot turned Cambodia into a killing field."<sup>28</sup> The exact number of those killed in that savagery may never be known; estimates range from 500,000 to 1,000,000 Tutsis.<sup>29</sup> Africa has witnessed other genocidal conflicts, due either to civil wars of decolonization<sup>30</sup> or to struggles for power, as that between Hutu and Tutsi in Burundi, or to the repression of secessionist attempts, as in Nigeria.<sup>31</sup> Each of these conflicts has resulted in the destruction of scapegoat groups or ideological, ethnic, or religious massacres.<sup>32</sup>

This "odious scourge," as the Genocide Convention describes genocide,<sup>33</sup> has been a recurring theme throughout history largely because history itself has been reluctant to punish it. According to William Schabas, "the Nazis were only among the most recent to rely confidently on the reasonable presumption that an international culture of impunity

24. Monty N. Penkower, *From Holocaust to Genocide*, in *TOWARDS THE UNDERSTANDING AND PREVENTION OF GENOCIDE: PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE HOLOCAUST AND GENOCIDE* 129, 129 (Israel W. Charney ed., 1984) [hereinafter *TOWARDS THE UNDERSTANDING AND PREVENTION OF GENOCIDE*].

25. MARTIN GILBERT, *ATLAS OF THE HOLOCAUST* 160 (1988); and generally CHRISTOPHER R. BROWNING, *THE PATH TO GENOCIDE: ESSAYS ON LAUNCHING THE FINAL SOLUTION* (1992); ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989).

26. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. On Prevention of Discrimination & Protection of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) (prepared by Benjamin Whitaker).

27. CENTRAL INTELLIGENCE AGENCY (CIA), *THE WORLD FACT BOOK: SUDAN*, available at [www.cia.gov/cia/publications/factbook/geos/su.html](http://www.cia.gov/cia/publications/factbook/geos/su.html) [hereinafter *CIA FACT BOOK*].

28. *Rwanda, Remembered*, *ECONOMIST*, 27 Mar. 2004, at 11 [hereinafter *Rwanda, Remembered*]. For an account of the Rwanda genocide, see generally BILL BERKELEY, *THE GRAVES ARE NOT YET FULL* (2001); ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999); ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* (1995); AFRICAN RIGHTS, *RWANDA: DEATH, DESPAIR AND DEFIANCE* 1101 (1995).

29. See U.N. Doc. E/CN.4/1994/7 (1994), ¶ 24. See also generally *Final Report of the Committee of Experts Established Pursuant to U.N. Security Council Resolution 935* (1994), U.N. Doc. S/1994/1405, 9 Sept. 1994; *Report of the United Nations Special Rapporteur on the Situation of Human Rights in Rwanda*, U.N. Docs. E/CN.4/1995/7, E/CN.4/1996/68.

30. See KUPER, *GENOCIDE*, *supra* note 21, at 17 (arguing that the arbitrary delineation of metropolitan domains brought about by colonization "has been a great creator of plural societies, and there have been many genocides in the process of decolonization or as an early aftermath of decolonization").

31. See *id.* at 17-18.

32. See *id.* at 18.

33. See Genocide Convention, *supra* note 3, pmb1.

would effectively shelter the most heinous perpetrators of crimes against humanity.”<sup>34</sup> Paradoxically, it was also the devastation of the Holocaust that provided the impetus for the eventual recognition of genocide as a crime in international law and as a basis for its prosecution and possible punishment.<sup>35</sup>

## B. THE PROHIBITION AND PUNISHMENT OF GENOCIDE

Genocide is derived from two root words, the Greek word *genos* (meaning race, nation, or tribe)<sup>36</sup> and the Latin suffix *caedere* (meaning killing). The renowned jurist Raphael Lemkin first penned the word genocide in 1944, in his book *Axis Rule in Occupied Europe*.<sup>37</sup> Lemkin, a Polish Jew who immigrated to the United States in the 1930s, originally used it in reference to the Nazi campaigns to exterminate the Jews, gypsies, and other ethnic groups in what is now regarded as the Holocaust. He defined genocide as an intentional,

coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. . . . [T]he actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>38</sup>

Lemkin’s coinage and definition of genocide received a quick reception in international law, principally due to “the understanding and support of this idea by the press of the United States and other countries.”<sup>39</sup> The word is now generally defined as “any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means.”<sup>40</sup> The Genocide Convention,<sup>41</sup> adopted almost at the same period genocide itself was coined, modified Lemkin’s definition, defining genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

34. See SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 17, at 1 (citing Hitler’s famous comment, “who remembers the Armenians?”); and generally Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 *YALE J. INT’L L.* 504 (1998).

35. See KUPER, *GENOCIDE*, *supra* note 21, at 20; cf. JOHN R.W.D. JONES & STEVEN POWLES, *INTERNATIONAL CRIMINAL PRACTICE* 144 (2003) (noting that the Genocide Convention was “drafted with Nazi atrocities in mind”).

36. See HENRY GEORGE LIDDEL & ROBERT SCOTT, *A GREEK-ENGLISH LEXICON* 344 (1996).

37. See RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944) [hereinafter LEMKIN, *AXIS RULE*].

38. *Id.* at 79.

39. Raphaël Lemkin, *Genocide as a Crime in International Law*, 41 *AM. J. INT’L L.* 145, 149 n.10 (1947).

40. *Prosecutor v. Krstic*, Case No. IT-98-33, judgment, ¶ 550 (Aug. 2, 2001).

41. See Genocide Convention, *supra* note 3. For literature, see NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* (1960); Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 *HARV. HUM. RTS. J.* 229 (1995); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 *B.U. INT’L L.J.* 1 (1985).

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>42</sup>

In the *Reservations to the Convention on the Prevention and Punishment of Genocide* case,<sup>43</sup> the International Court of Justice (ICJ) confirmed that genocide is “a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.”<sup>44</sup>

The Genocide Convention aims at preventing the intentional destruction of entire human groups. In *Prosecutor v. Jean-Paul Akayesu*<sup>45</sup>—“the first judicial interpretation of the enumeration”<sup>46</sup>—the International Criminal Tribunal for Rwanda (ICTR) maintained that the enumeration of groups is *ejusdem generis*. The enumeration comprises all stable groups constituted in a permanent fashion and membership that is determined by birth. The acts that are punishable are: “genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.”<sup>47</sup> The Convention establishes both individual and state responsibility for these acts; it provides: “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>48</sup> This intersection of collective and individual responsibility requires a careful consideration when attempting to attribute criminal responsibility for the crime.<sup>49</sup>

Genocide is punishable whether it is committed in time of war or peace<sup>50</sup> and no one, in both cases, is allowed to claim the defense of superior orders or an immunized act of state. Any person, whether or not connected to a state, can be a perpetrator of genocide, though only those belonging to the four types of groups mentioned in the proviso to article 2, namely “a national, ethnical, racial or religious group,”<sup>51</sup> can be victims of genocide. The Convention stresses that genocide “shall not be considered as political crimes for the purpose of extradition.”<sup>52</sup>

42. Genocide Convention, *supra* note 3, at art. 2. On the definition of genocide in the framework of the ICTY/R and ICC, see E. Fronza, *Genocide in the Rome Statute*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 105 (F. Lattanzi & W. Schabas eds., 1999).

43. *See Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 1951 I.C.J. 15 (May 28) [hereinafter *Genocide case*].

44. *Id.* at 23.

45. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, judgment, (Sept. 2, 1998).

46. William A. Schabas, *Genocide*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 107, 110 (Otto Triffterer ed., 1999).

47. Genocide Convention, *supra* note 3, at art. 3.

48. *Id.* at art. 4 (“Persons committing genocide or any of the other acts enumerated in article III [i.e., conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”).

49. *See* George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case* 3 J. INT’L CRIM. JUST. 539, 545 (2005).

50. *See* Genocide Convention, *supra* note 3, at art. 1; cf. *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, judgment, ¶ 631 (May 21, 1999) (stressing that genocide is directed against “members of a group,” without reference to civilian or military status); Application of the Convention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Preliminary Objections, 1996 I.C.J. 595, ¶ 31.

51. Genocide Convention, *supra* note 3, at art. 2.

52. *Id.* at art. 7.

Although the UN General Assembly condemned genocide in 1946 and included political groups as objects of genocide,<sup>53</sup> the Genocide Convention excludes political and economic groups from its ambit, largely due to the historical and political context surrounding its adoption.<sup>54</sup> During the drafting of the ICC Statute, some delegates suggested that the definition of genocide should be expanded to encompass social and political groups;<sup>55</sup> but this suggestion was rejected, with the result that the final provision reflects the Genocide Convention.<sup>56</sup>

Genocide is today generally regarded not just as a crime under international law but also as a peremptory norm (*jus cogens*), giving rise to an *erga omnes* obligation (obligation flowing to all).<sup>57</sup> The ICJ took this view in the *Genocide* case<sup>58</sup> and reaffirmed it in *Barcelona Traction, Light and Power Co.* case.<sup>59</sup> The significance of these holdings, from the point of view of the Darfur holocaust, is that Sudan is bound by the norms in the Genocide Convention—due to its peremptory character—though the country is not a party to the Convention. Undoubtedly, the Genocide Convention is a major component of the contemporary international protection of human rights though, regrettably, it “has operated more as a retrospective condemnation of the Nazi enterprise than a criminal code for the prospective enforcement or prevention” of genocide.<sup>60</sup>

Some commentators insist that the Genocide Convention as “a seriously flawed document,” on the ground that its “somewhat loose definition of the word genocide, the absence of any detailed meanings of its provisions has led to serious problems of interpretation.”<sup>61</sup>

53. See GA Res. 96(1) of Dec. 11, 1946. The resolution has been cited in many judicial decisions, reinforcing claims that it codifies customary principles. See, e.g., *Genocide* case, *supra* note 43, at 370; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.), Request for the Indication of Provisional Measures, 1993 I.C.J. 3, 23 (April 8) [hereinafter Request for the Indication of Provisional Measures case].

54. See JONES & POWLES, *supra* note 35, at 145.

55. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, ¶ 59-72, UN Doc. A/50/22; and *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶ 58-64, UN Doc. A/51/22.

56. See ICC Statute, *supra* note 12, at art. 6; cf. Statute of the International Criminal Tribunal for the former Yugoslavia art. 4, May 25, 1993 [hereinafter ICTY Statute]; S.C. Res. 827, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994 art. 2, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), amended by S.C. Res. 1165, U.N. Doc. S/RES/1165 (1998) [hereinafter ICTR Statute].

57. See, e.g., Claudia Annacker, *The Legal Regime of “Erga Omnes” Obligations and International Law*, 46 AUST. PUB. INT’L L. 131 (1994); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1 (1986).

58. *Genocide* case, *supra* note 43, at 23 (“The first consequence arising from this conception is that the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”).

59. *Barcelona Traction, Light and Power Co.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (reaffirming its position in the *Genocide* case and indicating that, given the importance of the rights at issue, certain areas exist such as the prevention and punishment of the crime of genocide for which states have obligations towards the entire international community and not only to another state).

60. Schaack, *supra* note 19, at 1112.

61. See CLAIRE DE THAN & EDWIN SHORTS, *INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS* 67 (2003) (arguing further that “the lack of compulsory means of enforcement mechanisms to punish those responsible for such atrocities has until relatively recently rendered this particular treaty, for all practical purposes, virtually redundant”).



For Helen Fein, "[t]he most serious problem in restricting oneself to the usage of the Convention is the Convention's exclusion of mass murder when the victims are annihilated solely on political grounds."<sup>62</sup> Using the UN's definition, Fein continues, the 1965-66 massacre of an estimated 200,000 to 500,000 "communists" by the Indonesian Army and local religious authorities could not be called genocide,<sup>63</sup> though Leo Kuper calls them genocidal massacres.<sup>64</sup> Furthermore, the offense described in the Genocide Convention tend to be committed mainly in plural societies; homogeneous societies are structurally modelled to exclude the possibility of domestic genocide, "unless the term is extended beyond racial, ethnic and religious groups to include the slaughter of political groups and social classes."<sup>65</sup> Some writers have also argued that the obliteration and atomic bombing of World War II<sup>66</sup> and even the nuclear element in current deterrence policies could amount to genocide,<sup>67</sup> propositions that Sydney Bailey regards as perverse.<sup>68</sup>

Schabas believes that there are undesirable consequences in attempting to enlarge or dilute the definition of genocide, since such attempts "weakens the terrible stigma associated with the crime and demeans the suffering of its victims [and that i]t is also likely to enfeeble whatever commitment States may believe they have to prevent the crime."<sup>69</sup> It is reasonable to conclude that the Genocide Convention was a mirror image of customary law at the time of its adoption<sup>70</sup> and that its importance has in no way diminished, given its direct transposition in later international instruments. The Convention is particularly significant for freeing the concept of genocide "from its association with war and render[ing] it applicable to the crimes of governments against their own nationals, whether committed in time of war or in time of peace."<sup>71</sup> Until January 12, 1951—when the Convention entered into force—international norms relating to war crimes did not extend to mass murder and extermination of a civilian population by its own government, though it prohibited the massacre of civilians by enemy soldiers during international armed conflict.<sup>72</sup>

62. Helen Fein, *Scenarios of Genocide: Models of Genocide and Critical Responses*, in *TOWARDS THE UNDERSTANDING AND PREVENTION OF GENOCIDE*, *supra* note 24, 3, 3-4.

63. See *id.* at 4 (referencing HAROLD A. CROUCH, *THE ARMY AND POLITICS IN INDONESIA* 151-57 (1978)).

64. See KUPER, *GENOCIDE*, *supra* note 21, at 10.

65. *Id.* at 187-8.

66. See LEO KUPER, *THE PREVENTION OF GENOCIDE* 13-14, 157 (1985) [hereinafter KUPER, *THE PREVENTION OF GENOCIDE*].

67. See *id.* at 229-40. Emrys Hughes also argued, on the occasion of the United Kingdom's ratification of the Genocide Convention, that if there were another war, persons responsible for the use of nuclear weapons could be charged with genocide. See *Hansard*, May 18, 1950, cited in SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 17, at 205.

68. See Sydney Bailey, in *Book Reviews*, 62 INT'L AFF. XXX, 658-59 (1986) (reviewing KUPER, *THE PREVENTION OF GENOCIDE*, *supra* note 66).

69. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 17, at 9.

70. See *Genocide case*, *supra* note 43, at 23; see also *Request for the Indication of Provisional Measures case*, *supra* note 53, at 3; cf. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 45, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Res. 808] (referring to the Genocide case and affirming that the Genocide Convention has become part of customary law).

71. KUPER, *THE PREVENTION OF GENOCIDE*, *supra* note 66, at 9.

72. See JONES & POWLES, *supra* note 35, at 144 (noting that breaches of article 3 common to the four Geneva Conventions of 1949, which protects the civilian population during internal conflicts, were not considered as war crimes at the time).

### III. Genocide and the ICID Report

The ICID is unambivalent on war crimes and crimes against humanity in Darfur; but it is ambivalent on the question of genocide, absolving the GoS of pursuing any genocidal policy. Its analysis of the jurisprudence on genocide is intensely interesting but its Report leaves a great deal to be explained, particularly as it fails to apply its premise to a logical conclusion. This Part joins issues with the ICID on its findings and conclusion on the question of genocide in Darfur.

#### A. ICID's FINDINGS

The ICID admits that it based its findings on reports by independent bodies, accounts by the GoS and rebel groups, and its own "independent investigations to establish the facts."<sup>73</sup> Its conclusions were "based on the evaluation of the facts gathered or verified through these investigations, [though] reports from other sources are relied upon for analysis where the facts reported are consistent with the results of the Commission's own inquiry."<sup>74</sup> The ICID, instructively, acknowledged limitations in its investigation, including the impossibility of investigating "all of the many hundreds of individually documented incidents reported by other sources."<sup>75</sup> The result was a selective investigation of "incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding."<sup>76</sup>

The Report confirmed that the GoS, in its response to the insurgency, has committed acts against the civilian population in Darfur. It established "two irrefutable facts about the situation in Darfur . . . ."<sup>77</sup>

Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur.<sup>78</sup>

The Report established a clear alliance between the GoS and the Janjaweed militias, an alliance that has proved an effective machine for heinous crimes. It stated that the Sudanese army and senior civilian authorities have made "regular supplies of ammunition" to the militias, which have been used to commit mayhem.<sup>79</sup> The ICID also found that the Sudanese armed forces have themselves committed vast attacks on civilians in Darfur villages.<sup>80</sup> It noted that many of the alleged crimes, which were committed "directly or through surrogate armed groups," have been widespread and systematic, thus amounting to "gross violations of human rights and humanitarian law."<sup>81</sup>

73. ICID Report, *supra* note 9, ¶ 222.

74. *Id.*

75. *Id.* ¶ 223.

76. *Id.* (noting further access to the sites of incidents, protection of witnesses, and the potential for gathering the necessary evidence were, amongst others, of major consideration in making its selection).

77. *Id.* ¶ 226.

78. *Id.*

79. ICID Report, *supra* note 9, ¶ 111.

80. *See id.* ¶ 240.

81. *Id.* ¶ 185.

As to the question of genocide, the ICID acknowledged that other reports on the Darfur crisis "have implied, and a few have determined, that the elements of the crime of genocide are present in the patterns and nature of violations committed by the Government and its militias."<sup>82</sup> It agreed that "some of the objective elements of genocide materialized in Darfur"<sup>83</sup> and, in fact, that it had

collected substantial and reliable material which tends to show the occurrence of systematic killing of civilians belonging to particular tribes, of large-scale causing of serious bodily or mental harm to members of the population belonging to certain tribes, and of massive and deliberate infliction on those tribes of conditions of life bringing about their physical destruction in whole or in part (for example by systematically destroying their villages and crops, by expelling them from their homes, and by looting their cattle).<sup>84</sup>

The Report, however, flip-flopped and insisted that the crucial element of genocidal intent is missing in Darfur, "at least as far as the central Government authorities are concerned."<sup>85</sup> Its conclusion on this point is both intriguing and disappointing: "[I]t would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, *primarily for purposes of counter-insurgency warfare*."<sup>86</sup> Alex de Waal sums up the ICID's conclusion—"[i]n short, the killings in Darfur looked like genocide but were actually a by-product of defeating the rebellion."<sup>87</sup>

The next segment examined the ICID's legal reasoning for its phony conclusion.

#### B. AN ANALYSIS OF ICID'S RATIONALIZATIONS

According to the ICID, two elements of genocide exist in the gross violations of human rights perpetrated by government forces in Sudan and the militias under their control. The ICID identified the first element as "the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction."<sup>88</sup> It identified the second element, "on the basis of a subjective standard, [as] the existence of a protected group being targeted by the authors of criminal conduct."<sup>89</sup> The ICID argued that the policy of attacking, killing, and forcibly displacing members of some tribes does not generally evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.<sup>90</sup>

It is not necessary to dwell on the objective element of genocide here, since the ICID appears to have established the *actus reus* of genocide in Darfur.<sup>91</sup> The ICID only insists

82. *Id.* ¶ 195.

83. *Id.* ¶ 507.

84. *Id.*

85. ICID Report, *supra* note 9, ¶ 507.

86. *Id.* (emphasis added).

87. Alex de Waal, *Deep down in Darfur*, TIMES LITERARY SUPPLEMENT, Aug. 12, 2005, at 5 (reviewing PRUNIER, *supra* note 16).

88. ICID Report, *supra* note 9, at 4.

89. *Id.*

90. *Id.*

91. For an analysis of the *actus reus* of genocide, see SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 151-205. In general, the material element of genocide requires proof of acts of genocide, which may also entail proof of outcomes from those acts. In case of the Genocide Convention, three acts require proof of results: killing members of the group; causing serious bodily or mental harm to members of the group; and

that there is no corresponding subjective or *mens rea* element to complete the crime of genocide. What, in any event, is a genocidal intent? When and for what reasons do we label the killing of people as genocide? Can ethnic cleansing amount to genocide? How about deliberately inflicting conditions destructive of life? This segment examines these and related questions in the context of the ICID Report. The present writer argues that there are several clues to discovering genocidal intent and that genocide could better be described in shades of grey than in black and white.

### 1. *Discovering Genocidal Intent*

The central plank of genocide, and one that gives its specialty and distinguishes it from an ordinary crime or other crimes against IHL,<sup>92</sup> is the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group . . . ."<sup>93</sup> Several international criminal tribunal decisions confirm this fundamental requirement, including the Appeals Chamber of the ICTR, which held in *Prosecutor v. Musema* that "[g]enocide requires proof of an intent [sic] to destroy, in whole or in part, a national, ethnical, racial or religious group . . . ."<sup>94</sup> The gravity of the crime of genocide is reflected in the stringent requirement of specific intent,<sup>95</sup> also variously referred to as special intent, *dolus specialis*, particular intent, or genocidal intent.<sup>96</sup> The special intent of a crime has been defined as "the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged."<sup>97</sup>

The two elements of the special intent requirement of genocide are, first, the act or acts must target a national, ethnical, racial, or religious group; and, second, the act or acts must seek to destroy all or part of that group.<sup>98</sup> The existence of a plan or policy, however, is not a legal ingredient of the crime of genocide; it is only evidentiary in supporting the inference

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forcibly transferring children of the group to another group. Two others do not require proof of results, though they require a further specific intent: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group. See Genocide Convention, *supra* note 3, at art. 2. In those cases where the outcome or result forms an element of the offence, the accused may also be prosecuted for attempting to commit the crime even if no result may be proven. See *id.* art. 3(d). Lastly, the material element of genocide may be either an act of commission or omission and this applies to all acts enumerated in article 2 of the Genocide Convention. See SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 156; and Kambanda, judgment & sentence, Case No. ICTR 97-23-S, ¶ 40(1).

92. See *Prosecutor v. Jelisić*, Case No. IT-95-10-T, judgment, ¶ 66 (Dec. 14, 1999).

93. Genocide Convention, *supra* note 3, at art. 2. For a statutory analysis of each element of genocide, albeit in relation to the ICC, see Preparatory Commission for the ICC, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes*]. The *Elements of Crimes* were elaborated, pursuant to article 9 of the ICC Statute, to assist the ICC in the interpretation and application of articles 6, 7, and 8 of the Statute.

94. *Prosecutor v. Musema*, Case No. ICTR 96-13-A, judgment, ¶ 366 (Nov. 16, 2001) (emphasis added); see, e.g., *Akayesu*, Case No. ICTR 96-4-T, ¶¶ 500-09; *Jelisić*, Case No. IT-95-10-T, ¶ 63; *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-T, judgment & sentence, ¶¶ 49-52 (Dec. 6, 1999); *Prosecutor v. Musema*, Case No. ICTR 96-13-A, judgment & sentence, ¶¶ 155-59 (Jan. 27, 2000).

95. *Prosecutor v. Krstić*, Case No. IT 98-33-A, judgment, ¶ 134 (Apr. 19, 2004).

96. See, e.g., *Musema*, Case No. ICTR 96-13-A, judgment & sentence, ¶¶ 164-67 (referring to specific intent and *dolus specialis* interchangeably); *Akayesu*, Case No. ICTR 96-4-T, ¶ 498 (referring to special intent or *dolus specialis*).

97. *Akayesu*, Case No. ICTR 96-4-T, ¶ 498.

98. See *Jelisić*, Case No. IT-95-10-T, ¶ 66; *Krstić*, Case No. IT 98-33-A, ¶ 550.

of intent, though it may help to establish that the accused possessed the requisite genocidal intent.<sup>99</sup>

The special intent characterizing genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group that he is seeking to destroy. Where the goal of the perpetrator(s) of the crime is to destroy all or part of a group, it is the "membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide."<sup>100</sup> Convictions for genocide can be entered only where specific intent has been unequivocally established. Knowledge is irrelevant in the crime of genocide, though it is an essential element of crimes against humanity.<sup>101</sup> Thus, while the perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference.<sup>102</sup>

The gravity and the scale of the crime of genocide ordinarily presume that several protagonists are involved in its perpetration, meaning that genocide requires a plan. Judicial and academic opinions support this view,<sup>103</sup> but neither the Genocide Convention nor the ICC Statute makes this an explicit requirement. In *Kayishema and Ruzindana*, the ICTR stressed that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without a plan or organization."<sup>104</sup> Assuming this proposition to be correct, the avalanche of evidence points to a systematic plan regarding the Darfur atrocities. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide shared the intention that such a crime should be carried out.<sup>105</sup>

Proof of genocidal intent—and this is particularly significant for the purpose of this Article—need not be by direct explicit evidence alone but may be inferred from a number

99. See Prosecutor v. Jelisić, Case No. IT-95-10-A, judgment, ¶ 48 (July 5, 2001); see also Krstić, Case No. IT-98-33-A, ¶ 225.

100. *Draft Code of Crimes against the Peace and Security of Mankind 1996*, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION, U.N. GAOR, 51st Sess., at art. 17, cmt. 6, U.N. Doc. A/51/10(SUPP) (1996) [hereinafter ILC Draft], cited with approval in Jelisić, Case No. IT-95-10-T, ¶ 67.

It is an externally perceptible quality or characteristic which the victim has in common with the other members of the group, which makes him distinct from the rest of society in the criminal mind of his attacker and which for that very reason causes the attacker to commit the crime against such marked and indicated individual. (emphasis supplied).

Cf. PIETER DROST, GENOCIDE, in THE CRIME OF STATE 124 (A.W. Sythoff ed., 1959).

101. See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 340 (Antonio Cassese et al. eds., 2002) (under customary international law, "it is only for crimes against humanity [and not for genocide] that knowledge of the widespread or systematic practice is required").

102. See Musema, Case No. ICTR 96-13-A, judgment, ¶ 223.

103. See, e.g., Prosecutor v. Karadžić and Mladić, Case No. IT-95-5-R61, IT-95-18-R61, ¶ 94 (July 11, 1996); Jelisić, Case No. IT-95-10-A, ¶ 655 (confirming the requirement of a plan as an evidentiary matter even if it is not explicitly part of the definition within the Genocide Convention); LEMKIN, AXIS RULE, *supra* note 37, at 79.

104. *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, ¶ 94.

105. See Akayesu, Case No. ICTR 96-4-T, ¶ 497.

of facts and circumstances. These circumstances include—and the ICID itself cites to these authorities—

the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others[,] . . . the scale of atrocities committed, their general nature, [whether committed] in a region or a country, . . . the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups[,] . . . the general political doctrine which gave rise to the acts[,] . . . the repetition of destructive and discriminatory acts[, or] the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct.<sup>106</sup>

Inferences could also be drawn from

the number of group members affected[;] . . . the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning; the systematic manner of killing[; and] the relative proportionate scale of the actual or attempted destruction of a group.<sup>107</sup>

Sexual violence has also been held to constitute an integral part of the process of destruction, as in the *Akayesu* case, in which the ICTR Trial Chamber held that rape and sexual violence constituted genocide, in the same way as any other act, as long as they were committed with specific intent to destroy a covered group in whole or in part.<sup>108</sup> The ICID Report fails to answer, for example, whether the systematic rape and sexual violence in Darfur were merely parts of counter-insurgency warfare or, as the present writer insists, were deliberate acts with intent to destroy the targeted three ethnic communities in Darfur. How about efforts by the GoS, as gathered by witnesses and documentary evidence, to erase traces of mass graves of executed civilians from the targeted group?

The ICID Report concedes that some government individuals may have acted with individual genocidal intent but it fails to attribute such actions to the state. Yet, as Fletcher and Ohlin argue, the evidence of intent will almost always be found at the individual level, and it is difficult to understand why genocidal intent to the group cannot be established.<sup>109</sup> It is amazing how the ICID could see the fern seed of systematic and widespread violations of human rights in Darfur amounting to crimes against humanity, but failed to see the elephant of genocidal acts. It is true that the Genocide Convention identifies genocidal intent in a precise way, meaning that much legal work is needed to broaden the Convention to include genocidal outcomes as secondary impact of other aims. But the Convention may well be useful mainly for prosecution after the fact, since it is almost impossible to reach a conclusion about genocide while it is actually occurring,<sup>110</sup> as is the case in Darfur.

106. *Id.* ¶¶ 523-24.

107. *Musema*, Case No. ICTR 96-13-A, judgment & sentence, ¶ 166; *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, ¶¶ 93, 527; cf. *Jelisić*, Case No. IT-95-10-A, ¶ 47.

108. See *Akayesu*, Case No. ICTR 96-4-T, ¶ 508.

109. See Fletcher & Ohlin, *supra* note 49, at 456.

110. See de Waal, *supra* note 87, at 4.

## 2. *Can Deliberately Inflicting Conditions Destructive of Life amount to Genocide?*

The ICID admits that there has been a large-scale destruction of villages throughout the three communities in Darfur (the Fur, Zaghawa, and Massaleit).<sup>111</sup> Nearly two million displaced Darfurians remain in camps and towns, entirely dependent on humanitarian aid. They cannot return to their homes and farms due to ongoing attacks, rape, looting, and assault by the GoS and the militias. Yet, the ICID failed to see any genocidal intent from these atrocious acts. The truth is that not all acts listed in article 2 of the Genocide Convention necessarily lead to death. The Convention defines genocide to include “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . . .”<sup>112</sup> The ICTR has interpreted acts constituting “conditions of life calculated to bring about [an ethnic group’s] physical destruction [as] subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>113</sup> There is no reason, other than a deceptive attempt to suppress the truth, to suggest that the Darfur situation does not accurately fit these descriptions.

The crime of genocide does not imply the actual extermination of a group in its entirety, but it is understood as such once any one of the acts mentioned in the Genocide Convention is committed with the specific intent to destroy “in whole or in part.”<sup>114</sup> There is considerable debate whether the phrase “in whole or in part” requires a considerable number of individuals to amount to genocide. The ILC believes that the part targeted must be significant enough to have an impact on the group as a whole, since “the crime of genocide by its very nature requires the intention to destroy at least a substantial part of a particular group.”<sup>115</sup> Benjamin Whitaker shares the same opinion, arguing that “[i]n part” would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership.<sup>116</sup> In *Prosecutor v. Clément Kayishema and Obed Ruzindana*,<sup>117</sup> the ICTR Trial Chamber held that the term in part in the Genocide Convention “requires the intention to destroy a considerable number of individuals who are part of the group.”<sup>118</sup> Similarly, in interpreting Article 4 of the ICTY Statute, the Appeals Chamber held that “[t]he intent requirement of genocide . . . is . . . satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.”<sup>119</sup>

The second view, and one that the present author shares, is that the expression “in whole or in part” indicates that the offender need not intend to destroy the entire group but only

111. See ICID Report, *supra* note 9, ¶ 3.

112. Genocide Convention, *supra* note 3, at art. 2(c).

113. *Akayesu*, Case No. ICTR 96-4-T, ¶ 506; cf. Manashaw, *supra* note 15, at 313 (asserting that “[g]enocide is therefore not merely an act of massive killing and certain non-lethal acts may also constitute genocide.”).

114. See *Akayesu*, Case No. ICTR 96-4-T, ¶ 497.

115. ILC Draft, *supra* note 100, at 89, 93-104.

116. Whitaker, *supra* note 26, ¶ 29; see also SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 238; ROBINSON, *supra* note 41, at 63 (explaining that a perpetrator of genocide must possess the intent to destroy a substantial number of individuals constituting the targeted group); and The Genocide Convention: Hearing before the S. Comm. on Foreign Relations, 97th Cong. 22 (1981).

117. See *Kayishema & Ruzindana*, Case No. ICTR 95-1-T, ¶¶ 97, 123.

118. *Id.* ¶ 97.

119. See, e.g., *Krstic*, Case No. IT 98-33-A, ¶ 12; see also *Jelavic*, Case No. IT-95-10-T, ¶ 82; cf. *Prosecutor v. Bagilishema*, Case No. ICTR 95-1A-T, judgement, ¶ 64 (June 7, 2001) (holding, “the intention to destroy must target at least a substantial part of the group”).

a substantial portion of it.<sup>120</sup> The Genocide Convention does not specify a threshold number of deaths that must occur to constitute genocide; neither are large numbers necessary.<sup>121</sup> In 1982, a General Assembly resolution described the massacres at Sabra and Shatila as genocide, though the victims numbered in few hundreds.<sup>122</sup> In any event, the determination of when the targeted part is substantial enough to meet the requirement of the Genocide Convention involves a number of considerations. One consideration will be the numeric size of the targeted part of the group, evaluated not only in absolute terms but also in relation to the overall size of the entire group. The prominence of the targeted part within the group can be a useful consideration, that is to say, "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial . . .".<sup>123</sup>

Tracing the evolution of this crime under international law, Schabas argues that "[g]enocide did not necessarily imply the immediate destruction of a national or ethnic group, but rather different actions aiming at the destruction of the essential foundations of the life of the group, with the aim of annihilating the group as such."<sup>124</sup> The objectives of a genocidal plan, according to Lemkin, is the "disintegration of the political and social institutions, of culture, language, national feelings, religions and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."<sup>125</sup> Lemkin's assertion raises the question whether the destruction in question includes the national, linguistic, cultural, or other identity of a particular group. According to the Trial Chamber of the ICTY, "an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide."<sup>126</sup>

### 3. *Can Ethnic Cleansing amount to Genocide?*

Some speak of Darfur in terms of ethnic cleansing,<sup>127</sup> and the ICID Report confirms such conclusions.<sup>128</sup> According to Human Rights Watch, there is

credible evidence that the government of Sudan has purposefully sought to remove by violent means the Masalit and Fur populations from large parts of Darfur in operations that amount to ethnic cleansing. The attacks directed against civilians, the burning of their villages, the mass killings of persons under their control, the forced displacement of populations, the destruction of their food stocks, livelihoods and the looting of their livestock by government and militia forces are not merely a scorched earth tactic or an element of a counterinsurgency

120. See *Report of the Preparatory Committee*, *supra* note 55, ¶ 60.

121. John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341, 350 (1999).

122. See G.A. Res. 37/123D, U.N. Doc. A/Res/37/123 (Dec. 16, 1982).

123. See *Krstic*, Case No. IT 98-33-A, ¶ 12.

124. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 27.

125. LEMKIN, AXIS RULE, *supra* note 37, at 79.

126. *Krstic*, Case No. IT 98-33-A, ¶ 580; cf. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 229 (arguing that the drafting history of the Genocide Convention would not sustain a construction of the genocidal intent that extends beyond intent at physical destruction); see also ILC Draft, *supra* note 100, at 90-91.

127. See, e.g., Hilary Anderson, *Ethnic Cleansing Blights Sudan*, BBC News, May 27, 2004, available at [http://news.bbc.co.uk/1/hi/programmes/from\\_our\\_own\\_correspondent/3752871.stm](http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/3752871.stm).

128. See ICID Report, *supra* note 9, ¶ 194 (noting that "some reports conclude that elements of persecution and 'ethnic cleansing' are present in the pattern of destruction and displacement").



strategy. Their aim appears to be to remove those ethnic groups from large areas of the region and redistribute this population, mainly into the vicinity of government-controlled towns where they can be concentrated, confined and controlled.<sup>129</sup>

The term ethnic cleansing is often used for the political purpose of avoiding the charge of genocide.<sup>130</sup> Although the phrase was excluded from the Genocide Convention negotiations, the General Assembly, in 1992, evokes "the abhorrent policy of 'ethnic cleansing', which is a form of genocide."<sup>131</sup> The General Assembly has reaffirmed its position in several other resolutions.<sup>132</sup> In general, resolutions of the General Assembly are not binding rules of international law; but they could "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*."<sup>133</sup> What is ethnic cleansing? A UN Commission of Experts defined the phrase as a

purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. . . . This purpose appears to be the occupation of territory to the exclusion of the purged group or groups.<sup>134</sup>

In the context of the ICTY, the crimes involved in ethnic cleansing have generally been characterized as either crimes against humanity or war crimes, and the extent to which they are considered as genocide depends on the facts of each. In some cases, the ICTY has held that exceptionally grave forms of ethnic cleansing may constitute genocide, a crime which, by definition, always arises out of persecution-type crimes against humanity.<sup>135</sup> At times, the Tribunal has invited the Prosecutor to consider amending an indictment when, as in the *Nikolic* case,<sup>136</sup> the policy of ethnic cleansing took the form of discriminatory acts of extreme seriousness tending to show its genocidal character.

129. *Darfur Destroyed*, *supra* note 11, at 40 (noting further that

[t]he subsequent denial of humanitarian assistance to this population by the government of Sudan, in conditions where the population has been rendered entirely dependent on relief, can also be considered as part of a strategy to weaken and perhaps destroy a large proportion of the displaced population and prevent their return to their home villages.).

130. See Manashaw, *supra* note 15, at 303 ("Defining a crime to be an act of genocide theoretically forces the international community to take action, while defining it as an act of ethnic cleansing may not.").

131. The Situation in Bosnia and Herzegovina, UN Doc. A/Res/47/121, UN Doc. A/47/PV.91, at 99.

132. See, e.g., Situation of Human Rights in the Territory of the Former Yugoslavia: Violations of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), UN Doc. A/Res/48/153; Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, UN Doc. A/Res/48/143; *id.* UN Doc. A/Res/49/205; *id.* UN Doc. A/Res/50/192; and *id.* UN Doc. A/Res/51/115. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 [hereinafter *Nuclear Weapons* case] (stressing that "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule," *id.*).

133. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 [hereinafter *Nuclear Weapons* case] (stressing that "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule," *id.*).

134. The Secretary-General, *Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, ¶ 130, delivered to the Security Council, U.N. Doc. S/1994/674 (May 27, 1994) *quoted in Darfur Destroyed*, *supra* note 11, at 39.

135. See *Jelusic*, Case No. IT-95-10-T, ¶ 68.

136. See *Prosecutor v. Nikolic*, Case IT-94-2-R61, Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, (Oct. 20, 1995).

In the second *Srebrenica* indictment of November 16, 1995, against Radovan Karadzic and Ratko Mladic, Judge Riad, in affirming the indictment, considered, *inter alia*, that

[t]he mass executions described in the indictment were evidently systematic, being organised by the military and political hierarchy of the Serbian administration of Pale, apparently with close support from elements of the army of the Federal Republic of Yugoslavia (Serbia-Montenegro). These executions were committed in the context of a broader policy of 'ethnic cleansing' which is directed against the Bosnian Muslim population and which also includes massive deportations [against the Bosnian Muslim population]. This policy aims at creating new borders by violently changing the national or religious composition of the population. As a result of this policy, the Muslim population of Srebrenica was totally banished from the area.

...

The policy of 'ethnic cleansing' referred to above presents, in its ultimate manifestation, genocidal characteristics. Furthermore, in this case, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is specific to genocide, may clearly be inferred from the gravity of the 'ethnic cleansing' practiced in Srebrenica and its surrounding areas, i.e. principally, the mass killings of Muslims which occurred after the fall of Srebrenica in July 1995, which were committed in circumstances manifesting an almost unparalleled cruelty.<sup>137</sup>

The present writer submits that the policy of ethnic cleansing in Darfur "presents, in its ultimate manifestation, genocidal characteristics," to borrow the expression of the ICTY. The ICID's reluctance to characterize the ethnic cleansing in Darfur as genocide clearly reflects the world's established caution in applying the term, despite the reality of mass extermination of persons for racial, ethnic, religious, or other reasons that has repeatedly thrust itself forward for judgment and reaction.

#### IV. An Escape from Reason

This final Part assesses the ICID Report and examines the hypocrisies of other international actors in the Darfur saga.

##### A. MORE FICTION THAN FACT

The present writer submits that the ICID Report is an escape from reason or, at best, a reason invented to justify a pre-determined result. The Report flies in the face of jurisprudence and throws overboard the "object and purpose"<sup>138</sup> of the Genocide Convention. The ICID deliberately defines the Darfur crisis in ways that make it less urgent and less demanding of the international community to intervene and suppress the genocide. By failing to call a spade a spade, the ICID has created a fictitious and factitious Darfur that is completely different from reality. It takes only an ostrich not to notice the gap between the ICID Report and the harvest of ethnically induced murder and mayhem in Darfur.

The ICID Report is particularly absurd because it naively relies on the official explanations by the GoS,<sup>139</sup> as if the ICID expected the GoS to admit to acts of genocide! Con-

137. JONES & POWLES, *supra* note 35, at 146 (citing Nikolic, Case IT-94-2-R61).

138. Cf. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (emphasis added)).

139. See ICID Report, *supra* note 9, at 3 ("In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives.").

versely, the ICID's determination may have been based on a higher standard of proof, but, as Holly Burkhalter argues, "invoking the [Genocide Convention] in situations where it clearly applies is not necessarily the most effective strategy for inspiring public support for action to prevent genocide and save those at risk."<sup>140</sup> "Could it not be argued," asks de Waal, "that genocide is a predictable corollary of counter-insurgency conducted in a certain manner? And is there not reason enough to deduce as much from the previous two decades of warfare in Sudan—and indeed from other modern wars?"<sup>141</sup>

It is not clear if the ICID considered the functional need to prevent perpetrators of the Darfur mayhem from making capital of its Report and continuing to kill with impunity, given that the Report downplays the orchestrated catastrophe in Darfur that inevitably will produce obscene human mortality in the years to come. It is possible, even probable, that the sheer magnitude of the Darfur atrocities overwhelms the international community, leading to what Burkhalter paradoxically calls "'promoting the many at the expense of the few.'"<sup>142</sup> It could also justifiably be argued that the ICID probably did not want to saddle the UN with yet another African mess, since it is easier to respond with aid and other political platitudes at the end of such pogroms than risk the few at the expense of the many. The ICID Report has, thus, strengthened the historical ineffectiveness of the UN in combating genocide, an ineffectiveness that is not only a common knowledge but also scandalous.

The UN's reaction to the Rwanda genocide readily comes to mind. In Rwanda, officials of the UN Secretariat failed to provide the UNSC with early warning of extremist plans to kill thousands of Tutsis and moderate Hutus. Three months before the genocide, General Dallaire—the UN commander in Rwanda—sent a fax to Kofi Annan, then head of the UN peacekeeping, warning that militias could exterminate 1000 Tutsis every twenty minutes.<sup>143</sup> Rather than present the facts to the UNSC, Annan urged General Dallaire to present the information to the Rwandan President, who was responsible for arming the militias in the first place.<sup>144</sup> When the genocide eventually commenced, the UNSC failed to respond;<sup>145</sup> the original peacekeeping force of 2500 was scaled down to an ineffectual squad of 270, on the orders of the UNSC.<sup>146</sup> On April 30, 1994, the UNSC issued a lame presidential statement echoing the terms of articles 1 and 2 of the Genocide Convention but deliberately avoiding the word genocide. The statement, which the French National Assembly later described as "l'hypocrisie la plus totale"<sup>147</sup>—though France itself was a major accomplice

140. Holly Burkhalter, *Preventing Genocide and Crimes Against Humanity*, 98 ASIL PROC. 41, 42 (2004).

141. de Waal, *supra* note 87, at 4.

142. Burkhalter, *supra* note 140, at 42 (arguing that "the unique characteristics of genocide—its broad reach and large number of victims—... appears to undermine practical strategies to save anyone").

143. See Power, Analysis, *supra* note 2.

144. See *id.*

145. See Chairman of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility ¶ 87, delivered to the Secretary-General and the General Assembly, U.N. Doc. A/59/565 (2004) [hereinafter *A More Secure World*].

146. See UN Doc. S/Res/912 (1994), ¶ 8; see also Philip Gourevitch, *The Genocide Fax*, THE NEW YORKER, May 11, 1998, at 42, 46; and generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

147. France, Assemblée nationale, Rapport d'information déposé en application de l'article 145 du Règlement par la Mission d'information de la Commission de la défense nationale et des forces armées et de la Commission des affaires étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda 1990 et 1994, Paris, 1999, at 307, cited in See SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 17, at 460.

in the genocide<sup>148</sup>—read: “the Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable by international law.”<sup>149</sup> For the record, Nigeria was one of the few African states then sitting on the UNSC;<sup>150</sup> it still is one of the states that have not yet ratified the Genocide Convention, though it prides itself as “the giant of Africa.”

“A lot,” says Power, “has happened since Rwanda. Rwanda has made a profound difference in people’s awareness of the possibility that genocide happens now and doesn’t just happen in black and white.”<sup>151</sup> In 2001, an International Commission on Intervention and State Sovereignty proposed the idea that sovereign states have the primary responsibility to protect their citizens from such avoidable catastrophe as Rwanda and that where they are unwilling or unable to do so, the international community has a secondary responsibility to act.<sup>152</sup> The UN echoed the same sentiment in 2004,<sup>153</sup> thus affirming that there is something inherent in the nature of the international system that obliges it to act upon a duty. The cancer of bestiality, in particular, must be the concern of everyone. Regrettably, the Darfur genocide has exposed the great gap that still exists between articulating a principle and fulfilling it; rather than act as a firewall against the ongoing genocide in Darfur, the UNSC has become an undertaker for the GoS.

Painfully, the essence of the current failure is not that the machinery that comprises the international order has broken down; the system, as Power insists, is working.<sup>154</sup> The essence of the problem is simply that there is no political will—no community—among states that comprise the so-called international community; it lies in “a persistent unwillingness to risk blood and treasure in defense of humanity.”<sup>155</sup> It is really alarming that while the Khartoum-Janjaweed criminal alliance is systematically killing and expelling black Africans from their homes and perfecting its genocidal mission in Darfur, the international community is busy debating the threshold for the determination of genocide.

The next segment examines the complicity of some powerful states and institutions in the Darfur tragedy.

## B. ACCESSORIES BEFORE AND AFTER THE FACT

The first country to consider in the word-mincing and hesitation game is the United States whose policy on genocide has been anything but consistent. During the Rwanda genocide of 1994, the United States refused to invoke the term genocide in its early weeks

148. See LINDA R. MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA’S GENOCIDE* (2000) (depicting the human tragedy that was allowed to unfold in Rwanda and the role of several governments, notably France, in fuelling this process).

149. Statement of the President of the Security Council Condemning the Slaughter of Civilians in Kigali and Other Parts of Rwanda, UN Doc. S/PRST/994/21 (Apr. 30, 1994).

150. See *id.* n.85.

151. Power, Analysis, *supra* note 2.

152. See generally INTERNATIONAL COMMISSION ON STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY* (2001).

153. See *A More Secure World*, *supra* note 145, ¶ 201 (“[T]here is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community”).

154. See Power, Analysis, *supra* note 2.

155. Schaack, *supra* note 19, at 1103.

lest, as Samantha Power observed, the terminology have legal implications necessitating the United States, a reluctant party to the Genocide Convention,<sup>156</sup> to take action to prevent and punish it.<sup>157</sup> In the case of Darfur, the U.S. Congress, “in an unprecedented action,”<sup>158</sup> passed a resolution in July 2004, declaring that the GoS was committing genocide in Darfur and urging the international community to respond through humanitarian intervention.<sup>159</sup> The U.S. House of Representatives approved the resolution by “the convincing margin of 422 votes to none—and the Senate ‘concurred.’”<sup>160</sup> The resolution called on the UN to assert leadership by calling “the atrocities being committed in Darfur, Sudan by its rightful name: ‘genocide.’”<sup>161</sup> It urged the U.S. Government to call events in Darfur genocide and to consider humanitarian intervention should the UNSC fail to act.<sup>162</sup>

Meanwhile, following an earlier Congressional resolution in July 2004, the U.S. State Department dispatched the Atrocities Documentation Team to refugee camps in Chad to ascertain whether the GoS was committing genocide. The investigation lasted from July to September and documented widespread atrocities along ethnic lines. The investigators interviewed about 1136 refugees and displaced Darfurians, 46 percent of which were the Zaghawa tribe, 8 percent the Fur tribe, and 30 percent the Massalit tribe.<sup>163</sup> Following this investigation, on September 9, 2004, the then Secretary of State, Colin Powell, who personally visited Darfur in June 2004, appeared before the Senate Foreign Relations Committee. He unequivocally stated that the GoS was committing genocide in Darfur: “When we reviewed the evidence’ . . . ‘we concluded—I concluded—that genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility and that genocide may still be occurring.” and that “no new action is dictated by [the genocide] determination.”<sup>164</sup> President George Bush, in an address to the General Assembly in September 2004, also referred to the atrocities in Darfur as genocide.<sup>165</sup>

Khartoum was initially uncomfortable with the United States characterization of the Darfur,<sup>166</sup> but was later emboldened by the fact that this superpower was merely barking and was not ready to move its military might to arrest the “ongoing genocide” in Darfur. Some commentators argue, and there is every reason to agree, that Powell’s goal in his

156. It took forty years for the US to ratify the Genocide Convention: President Truman asked the Senate to give its advice and consent to the treaty in June 1949; President Ronald Reagan deposited the signed treaty, with reservations, in the UN in November 1998. See generally LAWRENCE J. LeBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* (1981) (examining the politics of ratification of the Genocide Convention by the United States).

157. See generally SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002) (examining how Americans have very rarely marshaled their might to stop genocide and mass terror against Armenians, European Jews, Cambodians, Iraqi Kurds, Bosnians, and Rwandans).

158. Schaack, *supra* note 19, at 1109.

159. H.R. Con. Res. 467, 108th Cong. (2004). The resolution was unanimous with 12 members not voting.

160. *The World Notices Darfur*, *THE ECONOMIST*, July 31, 2004, at 9.

161. H.R. Con. Res. 467, ¶ 6.

162. See *id.* ¶ 1.

163. See U.S. DEPT. OF STATE, *DOCUMENTING ATROCITIES IN DARFUR*, State. Publ’n No. 11182 (Sept. 2004).

164. Samantha Power, *It’s Not Enough to Call it Genocide*, *TIME*, Oct. 4, 2004, at 36, 59 (citing Colin Powell, U.S. Secretary of State, testimony before Congress on September 9, 2004); see also Paul Richter & Maggie Farley, *U.S. Declares Darfur Crisis is Genocide*, *L.A. TIMES*, Sept. 10, 2004, at A3.

165. See George W. Bush, U.S. President, *President’s Statement on Violence in Darfur, Sudan* (Sept. 9, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040909-10.html>.

166. See William Maclean, *Sudan Accuses U.S. of Using Darfur Crisis as a Ploy*, *NAT’L POST*, Sept. 11, 2004, at A9.

genocide determination was only meant to increase political pressure on Khartoum since the July Congressional resolution had little effect in preventing the Khartoum-Janjaweed atrocities.<sup>167</sup> The present writer also locates the ambivalence of the US Government in its current fatigue in the messy Iraq war that has caused the United States both unexpected high casualties and, with Abu Ghraib,<sup>168</sup> embarrassment. As Richard Haass, president of the Council on Foreign Relations, argues, “[t]he war of choice against Iraq has narrowed choices elsewhere for U.S. foreign policy’ . . . .”<sup>169</sup>

Another reason for the United States’ failure to demonstrate leadership over the Darfur genocide might have been the fear of domestic political backlash, given its shambolic intervention in Somalia in 1993. The Somalia tragedy has also been used to explain America’s inaction in Rwanda in 1994. In October 1993, at the precise moment Rwanda appeared on the agenda of the UNSC, the United States lost eighteen soldiers in Somalia, a loss that made it politically awkward for the country to immediately become involved in another peacekeeping or enforcement action.<sup>170</sup> The Clinton Administration even instructed its representative at the UNSC not to use the word genocide in the context of the Rwanda debacle.<sup>171</sup>

In the aftermath of the Rwanda genocide, the International Panel of Eminent Personalities set up by the defunct Organization of African Unity to investigate the genocide recommended reparations for Rwanda and its victims to be paid by states that failed to act.<sup>172</sup> In response, Richard Boucher, the United States Department of State spokesperson, stated, *inter alia*, that the United States was

very active in supporting the aid effort. The other thing . . . to address is the President’s statement that he said we need to learn the lessons, we need to do everything we can in our power to help build the future. We have taken several steps to address the threat of resurgent genocide in the region and, more generally, improve the ability of the international community to deal with the issue of genocide, should we again have to face that task.<sup>173</sup>

President Bill Clinton also tried some damage control in 1998, when he publicly apologized for the failure in Rwanda:

The international community, together with nations of Africa, must bear its share of responsibility for this tragedy. . . . We did not act quickly enough after the killing began. We should

167. See David S. Cloud, *Powell Cites Sudan for Genocide but Calls U.N. Sanctions Unlikely*, WALL ST. J., Sept. 10, 2004, at A6.

168. See, e.g., James Risen, *G.I.’s are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15.

169. Glenn Kessler, *President Signals No Major Shift in Foreign Policy*, WASH. POST, Nov. 7, 2004, at A1; see also Louis Klarevas, *W Version 2.0: Foreign Policy in the Second Bush Term*, 29 FLETCHER F. WORLD AFF. 165, 170 (2005) (arguing that the limited American response to the Darfur genocide exemplifies the inability of the U.S. to address complex humanitarian crises, preferring to pass such crises to regional forces).

170. See Organization of African Unity International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide* ¶ 12.33, 12.36, delivered to the Secretary-General, OAU Doc. IPEP/PANEL (May 29, 2000) (reporting that the murder of the 18 US soldiers in Somalia traumatized the US Government and proved disastrous for Rwanda); see also *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT’L L. 677, 693 (2000).

171. See Douglas Jehl, *Officials Told to Avoid Calling Rwanda Killings Genocide*, New York Times, June 10, 1994, at A8.

172. See *The Preventable Genocide*, *supra* note 170, ¶ 12.36.

173. Richard Boucher, Spokesman, U.S. Dep’t of State Daily Press Briefing at 6-7 (July 7, 2000), in Sean D. Murphy, *OAU Report Regarding Rwandan Genocide*, 94 AM. J. INT’L L. 692, 694-95 (2000).

not have allowed the refugee camps [in Zaire] to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide. . . . All over the world there were people like me sitting in offices, day after day after day, who did not fully appreciate the depth and the speed with which you were being engulfed by this unimaginable terror.<sup>174</sup>

In the triumphant aftermath of the North Atlantic Treaty Organization operation in Kosovo in 1999, President Clinton made a rash pledge that America was ready to intervene and halt future genocide anywhere in the world:

[w]e can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if someone comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it is within our power to stop it, we will stop it.<sup>175</sup>

Less than a decade after, the United States has defaulted in paying this promissory note, despite its obvious ability to stop the terror in Darfur. The United States is even now taking pro-GoS policies; the Bush Administration recently requested Congress not to force sanctions on Khartoum.<sup>176</sup> Doublespeak is clearly one of the biggest problems of contemporary times and a great hindrance to the protection of human rights.

The United States is not alone in this word-mincing and hesitation game; some other powerful members of the international community with vested economic interest in Sudan are also engaged in a conspiracy of silence over Darfur. The Darfur genocide itself is not a threat to the economic interest of these states, which probably explains why they are reluctant to react in ways that might anger Khartoum and hurt their economic interest in Sudan as a whole. Russia sells fighter jets to Khartoum, including, probably, the powerful MI-24 combat helicopters that routinely bomb the Darfur villages. Chinese oil firms also have serious interest in Sudan, making it unlikely for these countries to take actions that will hurt their interests in Khartoum.<sup>177</sup>

In September 2004, the European Parliament voted 566 to 6 to declare that the GoS has committed acts that tantamount to genocide in Darfur and urged the GoS to arrest the perpetrators.<sup>178</sup> The same month, the German Defense Minister, speaking for the German Government, also declared that genocide was occurring in Darfur. Nothing has come out of these declarations, largely because some European companies, such as Germany's Siemens, have commercial interests in Khartoum.<sup>179</sup> In April 2005—three months after the ICID submitted its Report—Jack Straw, British Foreign Secretary, said that genocide was

174. See President Bill Clinton, remarks in Kigali, Rwanda (Mar. 24, 1998), in HOWARD BALL, *PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE* 155 (1999).

175. President Bill Clinton, remarks to the Kosovo Force (KFOR), Skopje, Macedonia (June 22, 1999), in HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY? TOWARDS A DIPLOMACY FOR THE TWENTY-FIRST CENTURY* 254 (2001).

176. See Guy Dinmore, *Zoellick Signals US Policy Shift on Darfur*, FIN. TIMES, Apr. 15, 2005, at 6; Nicholas D. Kristof, *Day 113 of the President's Silence*, THE N.Y. TIMES, May 3, 2005, at 25.

177. See *Sudan can't wait*, THE ECONOMIST, July 31, 2004, at 11.

178. Motion for a Resolution on the Humanitarian Situation in Sudan, Eur. Parl. Doc. (B5-0065/2004) (2004); *contra* Council of the European Union, Outcome of Proceedings: Sudan/Darfur, 13303/1/04 Rev 1 (Oct. 13, 2004) (documenting widespread killing of civilians and burning of villages in Darfur but failing to employ the term genocide.); see also Reuters, *Europe Sees No Genocide in Sudan Region*, N.Y. TIMES, Aug. 10, 2004, at A3.

179. See Eric Reeves, *The "Two Darfurs": Redefining a Crisis for Political Purposes*, SUDAN TRIBUNE, May 20, 2005, available at [www.sudantribune.com/article.php?id\\_article=9675](http://www.sudantribune.com/article.php?id_article=9675).

occurring in Darfur; but, like the United States and others, nothing has been evident in British policy that is commensurate with such a determination.<sup>180</sup> Eric Reeves notes that British commercial firms, such as Weir Pumps and Glasgow, continue their normal business with Khartoum.<sup>181</sup> For the European Union (EU), Darfur has become something of an embarrassment, especially as EU members of the UNSC have disagreed on several occasions on sanctions against Khartoum or conspired to delay other actions.<sup>182</sup> In January 2005, the month that ICID submitted its report to the UN, the EU gave Euro 50 million in aid to the GoS, promising another Euro 400 million, depending on "improvement of the situation in the Darfur."<sup>183</sup>

Of course, no measurable security improvement has occurred in Darfur. *A contrario*, the "ongoing genocide" is set to run its full course as the Khartoum-Janjaweed alliance consolidates its attack, including attacks on IDPs who try to return to their homes.<sup>184</sup> There is also a growing insecurity for humanitarian operations.<sup>185</sup>

The most absurd characterization of the Darfur pogrom came from the African Union (AU) Assembly, which decided, in July 2004, that, "though the humanitarian situation in Darfur is serious, it can not be defined as a genocide."<sup>186</sup> The AU Assembly did not make any attempt to investigate the crisis before hastily drawing its absurd conclusion, unlike the UNSC, at least. Yet the AU is the only international organization which Constitutive Act<sup>187</sup> gives it the right to intervene in Member States in cases of grave circumstances. One of its operating principles is the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide, and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.<sup>188</sup> Sudan is a State Party to the AU Act.

The Decision on Darfur has encouraged other Member States of the AU to stand by while the GoS continues its genocidal acts in Darfur. Yet, the AU Assembly has stressed that "the crisis [in Darfur] should be addressed with utmost urgency to avoid further escalation . . ."<sup>189</sup> The African Mission in the Sudan (AMIS) that the AU itself set up to

180. See *Gethin Chamberlain, Fear Hits Harvest in Fresh Threat to Darfur*, THE SCOTSMAN, May 3, 2005, at 23.

181. See Reeves, *supra* note 179.

182. See Jeppe Plenge Trautner, *The Politics of Multinational Crisis Management: The European Union's Response to Darfur*, at 3 (Sept. 13, 2005), Ph.D. dissertation, Aalborg University, available at <http://www.ihiis.aau.dk/~trautner/docs/Trautner2005b-03.pdf>.

183. *Id.* (citing European Commission 2005).

184. See generally *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, 17 HUM. RTS WATCH 1 *et seq.* (Dec. 2005), available at <http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf> [hereinafter *Entrenching Impunity*].

185. See BBC News, *Second Sudan Aid Worker Arrested* (May 31, 2005), available at <http://news.bbc.co.uk/2/hi/africa/4595911.stm>. Paul Foreman was arrested by Sudanese authorities on May 31, 2005, on the unproven claim that an MSF report on rape published on March 8 violated Sudanese law and that the report is "false." *Id.*

186. Assembly of the African Union, Decision on Darfur, AU 3d Ord. Sess. July 2004, ¶ 2, AU Doc. Assembly/AU/Dec.54 (III) (2004) [hereinafter Decision on Darfur].

187. See Constitutive Act of the African Union, July 11, 2000, AU Doc. CAB/LEG/23.15, 479 (2000) (as amended by the Protocol on Amendments to the Constitutive Act of the AU, July 11, 2003).

188. *Id.* at art. 4(h).

189. Decision on Darfur, *supra* note 186, ¶ 2.



monitor and observe compliance with all the ceasefire agreements,<sup>190</sup> in particular the N'Djamena Ceasefire Agreement<sup>191</sup> between the GoS and the rebel groups, has generally been beset with poor logistical planning and lack of funds. As if to trivialize a grave tragedy, the AU Assembly declared, in January 2006, that President El-Bashir of Sudan would assume leadership of the AU when the term of the current Chairperson Sassou Nguesso—a former coup maker from the Republic of Congo—expires in 2007. The relevant AU Declaration reads, *inter alia*, that

[t]he leaders expressed their appreciation for the initiative taken by H.E. President Omar Hassan Al-Bashir to accept the postponement of his term of Chairmanship for the [AU] until 2007. The leaders consider this gesture to be a true reflection of the great sense of responsibility and leadership demonstrated by President Al-Bashir. The leaders agreed after extensive consultations that the Sudan will assume the Chairmanship of the Union in the year 2007.<sup>192</sup>

Earlier, the AU Peace and Security Council (PSC)—the “standing decision-making organ for the prevention, management and resolution of conflicts” in Africa<sup>193</sup>—allowed Sudan to chair its meeting in Addis Ababa, Ethiopia in December 2005.<sup>194</sup> In 2004, the African Group nominated Sudan to the UN Commission on Human Rights,<sup>195</sup> notwithstanding that Khartoum despises human rights with impunity. One has to be overly optimistic to still believe that the AU vision and mission, if they ever existed, have not irretrievably derailed.

## V. Conclusion: Never Again or Ever Again?

The importance of national sovereignty in the international legal order might explain the historical ineffectiveness of the UN in policing the internal activities and especially atrocities of its Member States. As Pierre van den Berghé observed, “[t]he U.N. is first and foremost an organization of *states*, not of nations, and since most states are, in fact, threatened by the claims of nations, it is little wonder that the U.N. is pro-state and anti-nation.”<sup>196</sup> In recent years, however, the UN has emphatically stated that “the sovereignty

190. The initial contingent of the AMIS was 2,000, episodically deployed; the current force level is approximately 7,000. See Communiqué of the 17th Meeting of the Peace and Security Council, AU Doc. PSC/PR/Comm.(XVII), ¶ 4 (Oct. 20, 2004) (enhancing the AMIS).

191. N'Djamena Humanitarian Ceasefire Agreement (Apr. 8, 2004), available at [http://www.darfurinformation.com/cf\\_ceasefire\\_agreement.shtml](http://www.darfurinformation.com/cf_ceasefire_agreement.shtml). The N'Djamena Agreement was facilitated by the United States and the EU and signed by the two main opposition groups—the Sudan Liberation Army (SLA) and Justice and Equality Movement (JEM)—and the GoS on April 8, 2004, taking effect on April 11. The Agreement included a GoS commitment to disarm the Janjaweed militia and a protocol providing for humanitarian assistance in Darfur. All parties to the Darfur conflict, in particular the GoS, have repeatedly and routinely breached the N'Djamena and subsequent agreements.

192. Declaration by the Assembly of the AU, AU Assembly 6th Ord. Sess., AU Doc. Assembly/AU/Decl.2(VI) (Jan. 2006).

193. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 9 July 2002, art. 2 ¶ 1, available at [www.africa-union.org](http://www.africa-union.org).

194. See Udombana, *Pay Back Time in Sudan?* *supra* note 20, at 13.

195. For a list of current members of the UN Commission on Human Rights, available at <http://www.unhchr.ch/html/menu2/2/chrmmem.htm>.

196. Pierre van den Berghé, cited in KUPER, GENOCIDE, *supra* note 21, at 161.

of states must no longer be used as a shield for gross violations of human rights,'"<sup>197</sup> though it is difficult to reconcile such an outburst with its inaction or indifference in Darfur. As Lewis Carroll instructs readers of his *Alice's Adventures in Wonderland*, "the best way to explain it is to do it."<sup>198</sup>

Incidentally, Darfur emerged on the international scene at about the same time as the 10th anniversary of the Rwanda genocide. Like in Rwanda, the international community's lame response to the Darfur genocide indicates that it has learnt nothing from past failures and that it is doomed perpetually to repeat history, with the hope of *never* again becoming the reality of *ever* again.<sup>199</sup> There may not always be an immediate price to pay for being a bystander in crisis afflicting developing countries, including attempts by some of Africa's brutal regimes to wipe out minorities in their midst. But a continuous collective conspiracy of blindness and silence amidst genocide and other gross violations of human rights will eventually obliterate the residue of legitimacy of the international security system.

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197. *Annan Backs Individual Over State*, BBC News (Dec. 10, 2001), available at <http://news.bbc.co.uk/2/hi/world/europe/1701605.stm> (trumpeting the need to concentrate on individual rights); cf. *A More Secure World*, *supra* note 145, ¶ 200 ("The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council"); The Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, 17, U.N. Doc. S/24111, A/47/277 (June 17, 1992) (that "[t]he time of absolute and exclusive sovereignty . . . has passed").

198. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 26 (1898).

199. Cf. Simon Chersterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 316 (1997).